No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

QUESTION PRESENTED

This case asks whether the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692-1692p, applies in the foreclosure context.

Congress passed the FDCPA to eliminate "abusive, deceptive, and unfair debt collection practices" by "debt collectors." 15 U.S.C. 1692(a), (e). The FDCPA broadly defines the term "debt collector" as "any person" in "any business the principal purpose of which is the collection of any debts," or "any person" who "regularly collects or attempts to collect, directly or indirectly, debts owed or due * * * another." 15 U.S.C. 1692a(6). Although the Act does not define "debt collection," this Court previously has: "'[t]o collect a debt' is 'to obtain payment or liquidation of it.'" *Heintz* v. *Jenkins*, 514 U.S. 291, 294 (quoting *Black's Law Dictionary* 263 (6th ed. 1990)).

In a non-judicial foreclosure, an entity sends a consumer a series of notices, declaring that the consumer has defaulted on a debt, owes money to a creditor, and faces foreclosure due to the failure to pay. In response, if the consumer fails to cure the default or pay the debt, his or her house is liquidated to pay off the debt.

The question presented is:

Whether the FDCPA applies to non-judicial foreclosure proceedings.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Dennis Obduskey, the appellant below and plaintiff in the district court.

Respondents are McCarthy & Holthus LLP and Wells Fargo Bank, N.A., the appellees below and defendants in the district court.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Introduction 2
Statement 3
A. Background 3
B. Facts and procedural history 5
Summary of argument 11
Argument 14
I. Non-judicial foreclosure consitutes debt collection under the FDCPA 14
A. According to the Act's plain and ordinary meaning, non-judicial foreclosure qualifies as "debt collection" 14
B. The FDCPA's context and purpose confirm that non-judicial foreclosure is subject to the Act 21
C. The FDCPA's legislative history further confirms that non-judicial foreclosure qualifies as debt collection 23
II. Respondents' remaining efforts to evade the FDCPA's basic safeguards are meritless 24
Conclusion 29
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Page

Cases:

Alaska Trustee, LLC v. *Ambridge*, 372 P.3d 207 (Alaska 2016) ..... *passim*
Clark v. *Martinez*, 543 U.S. 371 (2005) 28
Cohen v. *Rosicki & Assocs., P.C.*, 897 F.3d 75 (2d Cir. 2018) 21
Glazer v. *Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013) ..... *passim*
Heintz v. *Jenkins*, 514 U.S. 291 (1995) 2, 4, 20, 27
Henson v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) 27
Ho v. *ReconTrust Co., NA*, 858 F.3d 568 (9th Cir. 2017) ..... *passim*
Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010) 4, 14
Kaltenbach v. *Richards*, 464 F.3d 524 (5th Cir. 2006) 9, 21
Kaymark v. *Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015) 23
Lapan v. *Greenspoon Marder P.A.*, No. 5:17-cv-130, 2018 WL 1033224 (D. Vt. Feb. 22, 2018) 17
McCray v. *Fed. Home Loan Mortg. Corp.*, 839 F.3d 354 (4th Cir. 2016) 18
McLaughlin v. *Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240 (3d Cir. 2014) 18
Piper v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227 (3d. Cir. 2005) ..... *passim*
Reese v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012) 22
Romea v. *Heiberger & Assocs.*, 163 F.3d 111 (2d Cir. 1998) 16
Shapiro & Meinhold v. *Zartman*, 823 P.2d 120 (Colo. 1992) ..... *passim*
Wilson v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006) 9

Page

Statutes and rule:

Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692-1692p 2
15 U.S.C. 1692(a) 3
15 U.S.C. 1692(b) 3
15 U.S.C. 1692(e) 3
15 U.S.C. 1692a(2) 20
15 U.S.C. 1692a(5) 4
15 U.S.C. 1692a(6) ..... *passim*
15 U.S.C. 1692a(6)(A)-(F) 5
15 U.S.C. 1692a(6)(C) 17
15 U.S.C. 1692a(6)(F) 8
15 U.S.C. 1692c(d) 20
15 U.S.C. 1692d(1) 4
15 U.S.C. 1692d(2) 4
15 U.S.C. 1692e(10) 4
15 U.S.C. 1692e(2) 4
15 U.S.C. 1692f(1) 4
15 U.S.C. 1692f(6) ..... *passim*
15 U.S.C. 1692g 4, 7, 8
15 U.S.C. 1692g(a) 7
15 U.S.C. 1692g(b) 7
15 U.S.C. 1692i 10
15 U.S.C. 1692i(a)(1) 3, 10, 21, 26
15 U.S.C. 1692n 28
28 U.S.C. 1254(1) 1
Colo. Rev. Stat. § 38-38-101(4) 14, 18
Colo. Rev. Stat. § 38-38-102.5(2)(b) 14
Colo. Rev. Stat. § 38-38-103 ..... 14, 28
Colo. Rev. Stat. § 38-38-106(6) 19
Colo. Rev. Stat. § 38-38-111(1) 19, 25
Colo. R. Civ. P. 120 10

Miscellaneous:

A. Levitin & T. Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1 (2011) 23
Black's Law Dictionary (6th ed. 1990) ..... I, 2, 19
Colorado County Treasurers & Public Trustees, *2017 Statewide Pub. Tr. Statistics* (Feb. 16, 2018) <https://tinyurl.com/2017-colo-stats> 15
S. Rep. No. 382, 95th Cong., 1st Sess. (1977) 3, 22, 24

In the Supreme Court of the United States

No. 17-1307

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 879 F.3d 1216. The opinion of the district court (Pet. App. 14a-32a) is unreported but available at 2016 WL 4091174.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2018. The petition for a writ of certiorari was filed on March 13, 2018, and granted on June 28, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692-1692p, are reproduced in an appendix to this brief (App., *infra*, 1a-6a).

INTRODUCTION

Under the FDCPA, a "debt collector" is "any person" who "regularly collects or attempts to collect, directly or indirectly, debts owed or due * * * another." 15 U.S.C. 1692a(6). And "[t]o collect a debt," in turn, "is to obtain payment *or liquidation* of it." *Heintz* v. *Jenkins*, 514 U.S. 291, 294 (1995) (quoting *Black's Law Dictionary* 263 (6th ed. 1990)) (emphasis added).

In every conceivable sense, non-judicial foreclosure is a clear and obvious attempt to collect a debt. The process starts with a series of notices. These notices declare a default, state the amounts owned, identify the creditor, instruct how and where to pay, and explain the consequences of failing to cure the default. Any normal consumer would understand these statements as a direct attempt to collect a debt. And if those notices fail to induce payment, the consumer's house is sold (*i.e.*, "liquidat[ed]") for the express purpose of *satisfying the debt*.

Thus, at its irreducible core, "*every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt)." *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013). While the process undeniably involves a "security interest[]" (15 U.S.C. 1692a(6)), it just as undeniably involves collecting debts: "Whether through reinstatement or less directly through foreclosure sale and recovery of the proceeds, '[t]here can

be no serious doubt that the ultimate purpose of foreclosure is the payment of money.'" *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207, 216 (Alaska 2016).

Congress crafted the FDCPA in broad terms. It expressly contemplated foreclosure as "debt collection" in one of its substantive provisions (15 U.S.C. 1692i(a)(1)), and it expressly excluded groups elsewhere that it wished to exempt—yet (unsurprisingly) said nothing about foreclosure. The Act was designed to protect consumers from deception and abuse, and its protections are profoundly needed in this sensitive area: a foreclosure on a family's home "is likely to be a devastating prospect for the homeowner, who may therefore be particularly susceptible to abusive collection practices." *Ambridge*, 372 P.3d at 217.

Non-judicial foreclosure easily qualifies as "debt collection" according to the FDCPA's plain text, context, purpose, and history. The court of appeals erred in holding otherwise, and its judgment should be reversed.

STATEMENT

A. Background

1. a. Congress enacted the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices." 15 U.S.C. 1692(a). It found this abuse was "a widespread and serious national problem," and it identified as a "primary" cause "the lack of meaningful legislation on the State level." S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977). Because "[e]xisting laws and procedures" proved "inadequate to protect consumers" (15 U.S.C. 1692(b)), Congress sought to impose baseline, comprehensive protections against debt-collector misconduct. 15 U.S.C. 1692(e).

Those protections took the form of "open-ended prohibitions," together with non-exhaustive lists of specific forbidden practices. *Jerman* v. *Carlisle, McNellie, Rini,*

Kramer & Ulrich LPA, 559 U.S. 573, 587 (2010); cf. S. Rep. No. 95-382, at 4. The Act targeted everything from aggression and violence (*e.g.*, 15 U.S.C. 1692d(1), (2)), to the use of "false or misleading representations," including misstating the "character, amount, or legal status of the debt," employing "deceptive means to collect" a debt, or demanding amounts not "expressly authorized by the agreement creating the debt or permitted by law" (15 U.S.C. 1692e(2), (10), 1692f(1)). See, *e.g.*, *Heintz* v. *Jenkins*, 514 U.S. 291, 292 (1995) (explaining the general prohibitions). The FDCPA also mandated a process for debt collectors to provide consumers notice of their alleged debts; this process granted consumers a specific right to dispute those debts, and required debt collectors to "cease collection of the debt" pending validation. 15 U.S.C. 1692g.

b. The FDPCA regulates solely the conduct of professional "debt collectors." The Act broadly defines "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6).[1] Any person meeting that definition is subject to the full panoply of the FDCPA's restrictions.

The Act further expands its coverage with an additional definition: "For purposes of section 1692f(6) of this title," the "term ['debt collector'] also includes any person

---

[1] The Act also broadly defines "debt": the term "means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. 1692a(5).

who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is *the enforcement of security interests*." 15 U.S.C. 1692a(6) (emphasis added). Section 1692f(6), in turn, regulates conduct typical of repossession agents (*i.e.*, the classic "repo men"):

> Taking or threatening to take any non-judicial action to effect dispossession or disablement of property if—
>
> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
>
> (B) there is no present intention to take possession of the property; or
>
> (C) the property is exempt by law from such dispossession or disablement.

15 U.S.C. 1692f(6). While the Act offers additional coverage for security enforcers, it does not textually exclude those qualifying under *both* definitions (the general and the additional) from the Act's general prohibitions.

This two-part definition of "debt collector" is followed by a list exempting six groups from the Act's scope. See 15 U.S.C. 1692a(6)(A)-(F). In enumerating these exemptions, Congress did not include entities pursuing foreclosures or enforcing other security interests.

B. Facts And Procedural History

1. In 2007, petitioner obtained a $329,940 home loan from Magnus Financial Corporation. Pet. App. 2a. At some point, the loan was transferred to other entities, and Wells Fargo Bank, N.A., began servicing the loan. *Id.* at 15a. Wells Fargo has since "'claimed numerous different owners of the note.'" *Id.* at 15a, 19a.

Between 2008 and 2012, Wells Fargo offered petitioner a variety of loan modifications. Pet. App. 15a. During that period, petitioner made 12 "trial payments" under three different modification offers. But rather than process the new loan modification, Wells Fargo "accepted the payments and applied them as 'late payments on the account and for other unspecified fees.'" *Ibid.* Petitioner received mixed communications from Wells Fargo throughout this time, including "'opposing messages [received] within days of each other.'" *Ibid.* Petitioner submitted complaints about Wells Fargo's conduct to the Federal Trade Commission. *Id.* at 15a-16a.

In 2009, petitioner defaulted on his loan, and Wells Fargo began non-judicial foreclosure proceedings. Pet. App. 2a, 15a. Over the next six years, Wells Fargo initiated multiple foreclosure attempts, but none were completed. *Id.* at 2a, 15a. It eventually retained respondent, a law firm, to pursue a foreclosure of petitioner's property. *Id.* at 2a, 16a. Respondent sent petitioner an "undated" letter in August 2014. *Id.* at 16a. It declared that respondent "may be considered a debt collector attempting to collect a debt," and "any information obtained will be used for that purpose." J.A. 37 (capitalization altered); Pet. App. 2a, 20a-21a. It advised petitioner of its intent to seek a non-judicial foreclosure, announced "the total amount of the debt currently owed," explained that "interest, late charges, and other charges" may increase "the amount due on the day you pay," instructed that "[t]he current creditor to whom the debt/loan is owed is[] Wells Fargo Bank, N.A.," and declared that it would "assume this debt to be valid unless [petitioner] dispute[s] its validity, or any

part of it, within 30 days after receiving this notice." J.A. 38; Pet. App. 2a.[2]

Petitioner responded to the letter with multiple objections. Pet. App. 2a, 16a; C.A. Supp. App. 124-125. He contested the alleged amount of the debt, and invoked the FDCPA's debt-validation procedures, which required respondent to cease all collection activity until confirming the validity of the debt and providing the necessary documentation to petitioner. Pet. App. 2a, 16a; see also 15 U.S.C. 1692g(a)-(b). Instead of validating the debt, respondent initiated a new foreclosure action in May 2015. Pet. App. 2a. In response, petitioner filed a complaint with the Consumer Financial Protection Bureau objecting to respondent's conduct. *Id.* at 16a.

2. In August 2015, petitioner filed this suit against respondent and Wells Fargo, asserting claims under the FDCPA and Colorado state law. Pet. App. 2a-3a, 16a. As relevant here, petitioner alleged that respondent was a debt collector, and its conduct violated multiple provisions of the FDCPA, including the debt-validation requirements of Section 1692g. *Id.* at 4a & n.2, 18a.

Respondent moved to dismiss, and the district court granted the motion. Pet. App. 14a-32a. As the sole basis for dismissal, the district court found that "the FDCPA does not apply to non-judicial foreclosures." *Id.* at 20a-21a. The court noted that "[n]ot all courts have agreed" on the issue, but it declared that "the majority" have decided "foreclosure activities are outside the scope of the FDCPA." *Id.* at 20a. It accordingly rejected "cases outside of this district" reaching the opposite conclusion

---

[2] Respondent later sent additional notices concerning the foreclosure, including a payoff quote and notice of election and demand for sale by public trustee. J.A. 39-40, 44-45. The notice of election expressly acknowledged that the property would be sold "for the purpose of paying the indebtedness thereby secured." *Id.* at 40.

(*ibid.*), and dismissed the case against respondent. *Id.* at 21a, 32a.

3. A unanimous panel of the Tenth Circuit affirmed. Pet. App. 1a-13a.

Like the district court, the court of appeals recognized the stark disagreement over the question presented. Pet. App. 3a, 5a. In order to "settle this confusion," it requested "supplemental briefing on the issue," and ultimately "h[eld] that the FDCPA does not apply to non-judicial foreclosure proceedings." *Id.* at 3a, 5a-12a.

Before squarely addressing the dispositive issue, the court first cleared the path for a clean disposition. Pet. App. 5a. It initially rejected respondent's argument that petitioner had "failed to adequately allege a claim against it under the FDCPA." *Ibid.* At a minimum, the court found, petitioner "has sufficiently pled that [respondent] failed to verify [petitioner's] debt after it was disputed, in violation of § 1692g." *Ibid.* It likewise rejected respondent's argument—"claimed for the first time in oral argument"—that petitioner had somehow "waived the FDCPA claim against it." *Ibid.* On the contrary, the court explained, petitioner "specifically argue[d] in his opening brief that [respondent] 'violated the FDCPA by ignoring [a] valid written request related to verification of the debt and continued to collect.'" *Ibid.*[3]

---

[3] The panel also affirmed the lower court's dismissal of petitioner's claims against Wells Fargo. As each court found, "[t]he FDCPA excludes 'any person collecting or attempting to collect any debt * * * which was not in default at the time it was obtained by such person.'" Pet. App. 4a (quoting 15 U.S.C. 1692a(6)(F)); *id.* at 18a. According to the panel, while it was unclear when (or if) Wells Fargo acquired the loan itself, petitioner "admit[ted] that Wells Fargo began servicing the loan before he went into default." *Id.* at 4a-5a; see also *id.* at 19a. That pre-default activity excluded Wells Fargo as a "debt collector" under the FDCPA. *Id.* at 5a, 19a-20a. Petitioner is not challenging that determination here.

Turning to the key issue, the court noted that "[w]hether the FDCPA applies to non-judicial foreclosure proceedings has divided the circuits." Pet. App. 5a. It stated that the "Ninth Circuit, along with numerous district courts, has held that non-judicial foreclosure proceedings are not covered under the FDCPA" (*id.* at 5a), while "[t]he Fourth, Fifth, and Sixth Circuits, as well as the Colorado Supreme Court," have taken the opposite position. *Id.* at 5a-6a (citing *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), *Kaltenbach* v. *Richards*, 464 F.3d 524 (5th Cir. 2006), *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013), and *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (Colo. 1992)). The panel also flagged conflicting decisions and "confusion" in the District of Colorado, emphasizing the need "to provide clarity in this circuit." *Id.* at 3a, 6a & n.3.

The panel started its analysis with the "plain language of the FDCPA." Pet. App. 5a-6a. Agreeing with the Ninth Circuit, the panel reasoned that "debt is synonymous with 'money,'" and the FDCPA applies "'only when an entity is attempting to collect' money." *Id.* at 7a (quoting *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 571-572 (9th Cir. 2017)). Because non-judicial foreclosures do not obligate consumers "'to pay money,'" the panel reasoned, such foreclosures are "not covered under the FDCPA." *Ibid.*

In reaching this conclusion, the panel expressly rejected "the Sixth Circuit's decision in *Glazer*." Pet. App. 8a (quoting *Glazer*'s "contrary" holding that "'*every* mortgage foreclosure' * * * is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion * * * or compulsion'"). According to the panel, this "contrary position" fails because non-judicial foreclosure does not permit collection "'personally against the mortgagor.'" *Ibid.* While a creditor could "collect a defi-

ciency" in a "separate action" after the "non-judicial foreclosure sale" (*id.* at 8a-9a (citing Colorado law)), the foreclosure itself "only allows 'the trustee to obtain proceeds from the sale of the foreclosed property, and no more'" (*id.* at 9a). The panel thus found that it did not qualify as a "direct[] or indirect[]" attempt (15 U.S.C. 1692a(6)) to collect a debt. Pet. App. 6a-9a.

Next, the panel rejected other courts' reliance on "§ 1692i—'Legal actions by debt collectors'—as evidence that Congress intended the FDCPA to apply to mortgage foreclosures." Pet. App. 9a. That section regulates permissible venue for "action[s] to enforce an interest in real property securing the consumer's obligation." 15 U.S.C. 1692i(a)(1). Although other courts read this language as necessarily confirming that "debt collection" includes foreclosure actions (the subject of Section 1692i), the panel "disagree[d]." Pet. App. 10a. It reasserted its view that seeking non-judicial foreclosure falls outside Section 1692a(6), and it further noted that Section 1692i only covers "judicial proceeding[s]," whereas "*non-judicial*" foreclosures "plainly do[] not fall under this definition." *Ibid.*

Finally, the panel asserted that "policy considerations" support its holding. Pet. App. 10a. It reasoned that applying the FDCPA in this context "would conflict with Colorado mortgage foreclosure law." *Id.* at 10a-11a (citing two examples where Colo. R. Civ. P. 120 requires "notice" arguably conflicting with the FDCPA). The panel stated that "mortgage foreclosure is 'an essential state interest,'" and found "no 'clear and manifest' intention on the

part of Congress to supplant state non-judicial foreclosure law." *Id.* at 11a.[4] In doing so, the panel rejected other courts' "contrary conclusion" that Congress would not have intended to "immunize debt secured by real property where foreclosure was used to collect the debt." *Id.* at 12a (citing conflicting decisions from the Third and Fourth Circuits).[5]

SUMMARY OF ARGUMENT

Although this question has divided the circuits, its proper disposition is remarkably straightforward. Non-judicial foreclosure qualifies as debt collection under the FDCPA, and that follows directly under the Act's text, context, purpose, and history. The Tenth Circuit's contrary determination was plainly wrong, and its judgment should accordingly be reversed.

I. A. The FDCPA defines a "debt collector" as any person who regularly collects, directly or indirectly, debts owed or due another. As this Court has already recognized, "[t]o collect a debt * * * is to obtain payment or liquidation of it." *Heintz*, 514 U.S. at 294 (quoting *Black's Law Dictionary* 263 (6th ed. 1990)).

---

[4] The panel earlier acknowledged commentary from the "Colorado Rule 120 Committee" recommending, in response to "'considerable debate'" over the FDCPA's applicability, that persons conducting non-judicial foreclosures "'comply'" with the FDCPA, "'notwithstanding any provision of this Rule.'" Pet. App. 6a n.3.

[5] The panel "left for another day" the distinct question whether "more aggressive collection efforts leveraging the threat of foreclosure into the payment of money" would "constitute 'debt collection.'" Pet. App. 12a. While both the Ninth and Tenth Circuits have raised that possibility, the core split among the circuits is whether non-judicial foreclosure *without* additional conduct qualifies as debt collection. *Id.* at 5a (acknowledging the conflict over this question). This is why the panel recognized its holding was necessary to resolve the rampant "confusion" in the lower courts. *Id.* at 3a, 6a & n.3.

That describes non-judicial foreclosure exactly. A non-judicial foreclosure directly attempts to collect a debt by threating the foreclosure itself. The pre-foreclosure notices declare a default, provide information on how to cure that default, and lay out the devastating consequence of failing to pay—losing one's home. With or without an express demand for payment, the message is unmistakably clear. Consumers are often left to cobble together any available funds to stave off foreclosure, and the notices serve as an obvious demand for payment.

Even if that demand fails, the foreclosure itself is an indirect attempt to collect the debt. The entire point of the foreclosure is to liquidate the asset and pay the underlying debt. Enforcing the security interest does not simply return the property to the creditor; the foreclosure, by law, automatically puts the house up for sale, and the proceeds are designated to pay down the debt. And this, again, is all assuming the consumer does not pay the debt outright to avoid the devastating prospect of losing his or her home.

B. This common-sense understanding is confirmed by the Act's context and purpose. In the Act's substantive provisions, Congress included a venue provision regulating foreclosure—an undeniable indication that it understood foreclosures were covered by the Act. And while Congress excluded other groups from the Act's scope, it conspicuously elected not to exclude foreclosure agents. It instead framed the Act's coverage in broad terms that readily capture foreclosure activity. Respondents have no basis for crafting a silent exception that appears nowhere in the Act's actual text.

The statutory purpose is also advanced by covering non-judicial foreclosure. Stripping away the FDCPA's protections would leave consumers vulnerable in an area

that hits (literally) closest to home. And that context presents the same risks and dangers of abuse and deceptive conduct found elsewhere; indeed, the problems are heightened given the desperation consumers often feel in trying to save the family home.

C. The same conclusion is reinforced by the Act's history. Congress specifically referenced mortgages and mortgage servicers in reviewing the Act. Given that foreclosure is a primary debt-collection tool in that context, it is inconceivable that Congress intended to exclude non-judicial foreclosure at the same time it effectively confirmed that mortgages would be included in the Act's coverage.

II. Respondents attempts to avoid the FDCPA's protections are unavailing.

A. First, it makes no difference that non-judicial foreclosure involves a security interest. Under the FDCPA's plain language, "debt collection" can involve the enforcement of security interests, so long as it *also* involves an attempt, "directly or indirectly," to collect a debt. The additional definition applies where one does not *otherwise* qualify under the general definition; it does not exclude those who qualify under both prongs.

Moreover, the additional definition plainly targets classic "repo" activity—attempts to take collateral and return it the creditor, not an attempt to collect or liquidate the debt.

B. Second, respondents' resort to federalism principles falls short. Congress already regulates in this area, so there is no basis to presume any special solicitude for local control. And the federal and state schemes easily coexist, which is why courts rejecting respondents' rule have not seen their foreclosure systems grind to a halt.

In any event, Congress already instructed courts how to resolve any possible incompatibilities in this area: Section 1692n says that inconsistent state laws are preempted to the extent they provide lesser coverage. That is consistent with Congress's express statement of purpose: it was providing a nationwide, baseline set of rules, and doing so precisely because state laws had proven inadequate. It makes little sense to presume that Congress abandoned that stated purpose (without saying a word about it) in the foreclosure context alone.

ARGUMENT

I. NON-JUDICIAL FORECLOSURE CONSITUTES DEBT COLLECTION UNDER THE FDCPA

A. According To The Act's Plain And Ordinary Meaning, Non-Judicial Foreclosure Qualifies As "Debt Collection"

The FDCPA defines a "debt collector" as "any person" who "regularly collects or attempts to collect, directly or indirectly, debts owed or due * * * another." 15 U.S.C. 1692a(6). In every plain and ordinary sense, non-judicial foreclosure satisfies that definition as a "direct[] or indirect[]" method of collecting a debt.[6]

1. a. Non-judicial foreclosure is a "direct" attempt to collect a debt. The foreclosure process starts with a series of notices, which announce the overdue debt and explain the prospect of foreclosure. See, *e.g.*, Colo. Rev. Stat. §§ 38-38-101(4), 38-38-102.5(2)(b), 38-38-103. It is obvious to anyone what these notices mean. They instruct the amounts owed, explain the consequences of failing to pay, detail the opportunity to cure (which means *paying the*

---

[6] In *Jerman*, this Court addressed a different question under the FDCPA in a case that also arose in the foreclosure context. See 559 U.S. at 578-579. Not a single member of the Court raised any doubt that foreclosures were covered by the FDCPA.

debt), and disclose loss-mitigation avenues, which represent different ways of paying the debt. To a consumer, these notices are indistinguishable from a letter noting that a debt is overdue and the failure to pay will lead to a lawsuit. The only difference is the harsher consequence (losing one's home) of not paying.

Respondents' notices in this case underscore the clear effect of the message. These documents declare that the "foreclosure" process is being "commence[d]" (J.A. 37); state "the total amount of the debt currently owed" (*id.* at 38); explain that, "[b]ecause of interest, late charges, and other charges," "the amount due on the day you pay may be greater" (*ibid.*); identify "[t]he current creditor to whom the debt/loan is owed" (*ibid.*); provide information for a "[l]oss [m]itigation" representative (*id.* at 42); declare a "failure to make timely payments" (*id.* at 39); provide a "payoff quote" (*id.* at 44); explain that "[w]aiting to make your payment may increase the amount necessary to cure the default" (*id.* at 45); and advise that "you should submit payment as quickly as possible to avoid incurring any additional fees or costs" (*ibid.*).

The import is loud and clear to any ordinary consumer: if the "amount due" is not paid, she faces the shattering consequence of losing her home. *E.g.*, *Ambridge*, 372 P.3d at 217-218. That imposes at least as strong an incentive to pay up as the desire to avoid a lawsuit over an unpaid $50 phone bill. And, in fact, the process does indeed prompt payments: in 2017 alone, over 10% of consumers cured their defaults to avoid foreclosure, and 71% of foreclosures were withdrawn before sale (some due to loan modifications, which ensure continued payment of the debt). See Colorado County Treasurers & Public Trustees, *2017 Statewide Pub. Tr. Statistics* (Feb. 16, 2018) <https://tinyurl.com/2017-colo-stats>.

Far from simply enforcing a security interest, this shows that the process works as intended—it often induces payment to avoid the devastating personal and financial effects of losing one's home. It simply blinks reality to suggest this kind of notice—announcing an upcoming foreclosure absent some form of payment—is not a direct attempt to collect a debt.[7]

b. As a matter of simple common sense, these notices are collection attempts, and there is no basis for excluding them from the Act's reach.

First, it is irrelevant that these notices are generally required by state law. See, *e.g.*, *Piper* v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 235 (3d. Cir. 2005); *Romea* v. *Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998); *Ambridge*, 372 P.3d at 217-218. Congress did not textually exempt state-mandated notices from the FDCPA, and for good reason. Suppose, for example, that a State believed it was so important to avoid foreclosure that it required persons to demand full payment three times (in classic dunning letters) before enforcing a security interest. No one would reasonably suggest that those three demands fall outside the FDCPA because they were mandated by state law.

The entire point of the Act was to provide baseline protections because state law was often inadequate. 15 U.S.C. 1692(b). It would flip the FDCPA's purpose on its head to

---

[7] The Tenth Circuit admitted that "[h]ad McCarthy attempted to induce Mr. Obduskey to pay money by threatening foreclosure, the FDCPA might apply." Pet. App. 9a. This ignores that, understood for a real-world perspective, *all* pre-foreclosure notices are attempts to induce payment—indirectly if not directly.

excuse deficient or improper conduct because the State demanded it. See, *e.g.*, *Piper*, 396 F.3d at 236 & n.11.[8]

Second, according to the Ninth Circuit, if effectuating the *actual* foreclosure is not "debt collection" (contra Part I.A.2, *infra*), then the same entity "must be able to maintain that status when it takes the statutorily required steps to conduct the trustee's sale." *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 573 (9th Cir.), cert. denied, 138 S. Ct. 504 (2017). This is a non-sequitur. The fact that *earlier* activity is a prerequisite to *later* activity does not transform an obvious act of debt collection into something else. If an attempt to enforce a security interest involves *both* security enforcement and "attempts to collect, directly or indirectly, debts owed," the party is a "debt collector." 15 U.S.C. 1692a(6).

Third, nor does it matter whether respondent's notices included an "express" demand for payment. Contra *Ho*, 858 F.3d at 574. "There is no meaningful distinction between a demand for repayment and a statement of the consequences for failure to make repayment. The expected effect on the recipient's behavior is the same." *Lapan* v. *Greenspoon Marder P.A.*, No. 5:17-cv-130, 2018 WL 1033224, at *4 (D. Vt. Feb. 22, 2018). And that is assuredly true here. The notice's message was unmistakable: pay up or lose your house. There is no need to read between the lines. A consumer who receives a notice that they will lose their home to foreclosure unless they pay a deficiency or apply for a modification understands the no-

---

[8] Moreover, the lack of an exemption is presumptively deliberate: Congress excluded other groups from the Act's scope (*e.g.*, 15 U.S.C. 1692a(6)(C) (excusing state "officer[s] or employee[s]" who collect official state debts)), but did not likewise protect formal notices required by state law.

tice as an attempt to collect their debt. Any theoretical difference between that type of notice and an explicit payment demand is immaterial.

Moreover, "nothing in [the] language [of the FDCPA] *requires* that a debt collector's misrepresentation [or other violative actions] be made as part of an *express demand for payment*." *McCray* v. *Fed. Home Loan Mortg. Corp.*, 839 F.3d 354, 359 (4th Cir. 2016). On the contrary, the FDCPA textually covers direct *or indirect* attempts to collect a debt, and a strong hint to pay (by setting out the consequences of *not* paying) qualifies, at a minimum, as an indirect attempt to collect a debt. See, *e.g.*, *McLaughlin* v. *Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 245-246 (3d Cir. 2014) ("discussions of the status of payment [and] offers of alternatives to default" may constitute debt collection; "a communication need not contain an explicit demand for payment to constitute debt collection activity").

Finally, the Tenth Circuit suggested that, while the notices here were not enough, "more aggressive collection efforts leveraging the threat of foreclosure" may constitute debt collection. Pet. App. 12a. But it is difficult to draw an administrable line between so-called "aggressive" and more plain-vanilla demand letters. In this context, each letter will at least notify the debtor that a certain amount is owed and explain that the creditor will foreclose absent payment or cure. See Colo. Rev. Stat. § 38-38-101(4). An explicit demand (or explicit threat) may make the message more emphatic, but all the material components are the same. The Tenth Circuit's standard is unworkable, and it would predictably invite pointless and

time-consuming litigation while eliminating clear guidance for regulated entities.[9]

2. At a minimum, non-judicial foreclosure is an "indirect" attempt to collect a debt. *E.g.*, *Glazer*, 704 F.3d at 461; *Shapiro*, 823 P.2d at 124 ("a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt").

As *Heintz* established, collecting a debt means "to obtain payment or liquidation of it." 514 U.S. at 294 (quoting *Black's Law Dictionary* 263 (6th ed. 1990)). That is exactly what non-judicial foreclosure is designed to do. A foreclosure sells the house to pay the debt. The sale's proceeds go to the creditor until the debt is satisfied. Colo. Rev. Stat. § 38-38-111(1). Any excess goes to the consumer (Colo. Rev. Stat. § 38-38-111(2)), and any shortage is marked as a deficiency, subject to collection in a separate lawsuit (Colo. Rev. Stat. § 38-38-106(6)). That fits precisely within the ordinary, plain meaning of "collection": the asset is liquidated to pay the debt. *E.g.*, *Ambridge*, 372 P.3d at 216 ("foreclosing on property, selling it, and applying the proceeds to the underlying indebtedness constitute one way of collecting a debt—if not directly at least indirectly").

This further describes how respondents themselves understand the procedure. Their notice of election and demand was unequivocal: they demanded that the public trustee "sell said property *for the purpose of paying the indebtedness thereby secured.*" J.A. 40 (emphasis added). This illustrates that, contrary to respondents' contention, non-judicial foreclosure does indeed "permit the creditor

---

[9] For example, a foreclosure notice that includes a payment stub—without any explicit demand to use it—is surely requesting payment, especially against the backdrop of a threat to sell the house to pay the debt. But it is unclear whether any court would find that sufficiently "aggressive" to meet the Tenth Circuit's standard.

to obtain the payment of * * * money." Br. in Opp. 12. It does so deliberately by liquidating the debt.

According to the Ninth Circuit, however, "the object of a nonjudicial foreclosure is to retake and resell the security, not to collect money *from the borrower*." *Ho*, 858 F.3d at 571 (emphasis added). This misses the point. The reason for "retaking and reselling the security" was precisely to "collect money" by *liquidating the borrower's debt*. The statutory definition does not say that the money must come directly from the consumer's pocket. Cf., *e.g.*, 15 U.S.C. 1692a(2) (a "communication" can be made "directly or indirectly to any person through any medium"). It textually asks whether the party is "attempt[ing] to collect, directly or indirectly, *debts owed*"—which it does by "obtaining payment *or liquidation of it*." *Heintz*, 514 U.S. 294. Selling petitioner's house to pay off petitioner's debt fits squarely within the plain meaning of the FDCPA. See *Ho*, 858 F.3d at 578 (Korman, D.J., dissenting) (under the Act's plain text, it does not "matter that the money collected at a foreclosure sale does not come directly from the debtor").[10]

---

[10] It makes sense that the statutory definition does not turn on *where* the money comes from; all that matters is that the person attempts to collect the debt (by payment or liquidation) that the consumer "owed." 15 U.S.C. 1692a(6). The Act's surrounding provisions confirm that the text means what it says. Congress thus created express protections for parents and spouses who a debt collector may contact (15 U.S.C. 1692c(d)), prohibited debt collectors from "harass[ing], oppress[ing], or abus[ing] *any* person in connection with the collection of a debt" (15 U.S.C. 1692d)), and broadly defined "communication" to reach "conveying information regarding a debt directly or indirectly to *any* person through any medium" (15 U.S.C. 1692a(2)). Otherwise, debt collectors would be free to engage in abusive tactics to pressure a debtor's parents or spouse for the money. (In any event, for obvious reasons, when a debt is "liquidated," the source of funds will usually be third parties.)

B. The FDCPA's Context And Purpose Confirm That Non-Judicial Foreclosure Is Subject To The Act

The FDCPA's context and purpose readily confirm what the text already makes clear: non-judicial foreclosure qualifies as debt collection.

1. The FDCPA's surrounding provisions reaffirm that non-judicial foreclosure is covered.

First and foremost, Congress included a substantive provision that expressly contemplates that foreclosure constitutes "debt collection." Under 15 U.S.C. 1692i(a)(1), Congress specified the venue for "debt collectors" bringing "action[s] to enforce an interest in real property securing the consumer's obligation." This provision is an obvious reference to foreclosures (*i.e.*, an "action to enforce an interest in real property"), and it applies exclusively to "debt collectors." See *Cohen* v. *Rosicki & Assocs., P.C.*, 897 F.3d 75, 83 (2d Cir. 2018). This provision only makes sense if Congress understood that foreclosures would fall within the Act's reach. See, *e.g.*, *Glazer*, 704 F.3d at 462. Respondents' reading, by contrast, would leave this substantive provision with no realistic application. *E.g.*, *Kaltenbach* v. *Richards*, 464 F.3d 524, 528 (5th Cir. 2006) (explaining how a contrary reading would leave Section 1692i(a)(1) "without effect").

Second, Congress expressly excluded certain groups, *but not entities pursuing foreclosures*, from the FDCPA's scope. See 15 U.S.C. 1692a(6) (enumerating six such categories). These exclusions appear in the same section that defines "debt collector." When Congress wanted to carve out an exception, it thus did so expressly. But it otherwise framed the Act's coverage in broad terms (15 U.S.C. 1692a(6) (covering "any person" in "any business" collecting "any debts")), and there is no basis for silently cutting back the language's natural reach. See, *e.g.*, *Ambridge*, 372 P.3d at 217; *Shapiro*, 823 P.2d at 124; see also S. Rep.

No. 95-382, at 3 ("The committee intends the term 'debt collector,' subject to the exclusions below, to cover *all third persons* who regularly collect debts for others.") (emphasis added).[11]

2. The FDCPA's purpose is plainly advanced by covering non-judicial foreclosure.

Congress enacted the FDCPA because "many" debt collectors were engaged in "abusive" and "deceptive" practices (15 U.S.C. 1692(a)), and existing laws (including state laws) had proven "inadequate" in preventing consumer harm (15 U.S.C. 1692(b)). There is no indication that the foreclosure context was immune to these systemic problems, or that Congress would have tolerated this abuse where consumers face the devastating loss of a family home.

On the contrary, Congress would have every reason to be especially concerned in this context. See, *e.g.*, *Ambridge*, 372 P.3d at 217. Consumers are vulnerable and face a high risk of abuse given the grave consequences. And abusive debt collectors can exploit a competitive advantage by relying on shoddy or unethical work. Yet errors in this context are far more intolerable than errors in other collection settings. A family could lose its home if a debt collector falsely inflates the amounts owed beyond the family's capacity to cure, or a consumer is left without the information necessary to make an informed decision

---

[11] Congress also defined "debt" as "*any* obligation," not just unsecured obligations. 15 U.S.C. 1692a(5); see also, *e.g.*, *Reese* v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1218 (11th Cir. 2012) ("A debt is still a 'debt' even if it is secured."). If Congress felt that all security interests should be treated differently, it would have said so expressly. See, *e.g.*, *Ambridge*, 372 P.3d at 213 ("The definition of 'debt' plainly encompasses a home mortgage, * * * and the definition does not differentiate between consumer debts that are secured and those that are not.").

to pay the debt, challenge the demand, or accede in the consequences of default.

A family's home is typically its most important asset. It is where children are raised, and communities are formed. "Foreclosures also have unquantifiable but serious social costs because so many social relationships, such as school, medical care, religious congregations, friendships, and employment are geographically based, and are sometimes rent asunder by the relocation of foreclosed homeowners and their families." A. Levitin & T. Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 84 (2011). The FDCPA provides critical safeguards to root out debt-collector mistakes, ward off abusive conduct, and ensure fair and honest treatment. If Congress intended to create a massive "loophole" for this significant category of consumer debt, it would have said so expressly. *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168, 179 (3d Cir. 2015); *Wilson*, 443 F.3d at 378-379.

In sum, there is no apparent reason that Congress would regulate all manner of collection activity (including state-court litigation), yet would not regulate non-judicial foreclosure. Respondents' attempt to read an atextual exclusion into the Act is directly at odds with its language, context, and purpose, and it should be rejected.[12]

C. The FDCPA's Legislative History Further Confirms That Non-Judicial Foreclosure Qualifies As Debt Collection

The legislative history further confirms that Congress intended the FDCPA to apply in this setting. The key

---

[12] Nor does reading the Act to mean what it says impose a particularly high bar. Whether the Act applies is a threshold question. The fact that it applies does not mean that every foreclosure is actionable; it simply means that debt collectors must honor the same general rules that they honor in every other collection context.

Senate report stated that the "[t]he collection of debts, *such as mortgages* and student loans, by persons who originated such loans" is not debt collection. S. Rep. No. 95-382, at 3 (1977) (emphasis added). This "impl[ies] that the collection of mortgages by persons who did *not* originate such loans *is* debt collection." *Ambridge*, 372 P.3d at 213. And the same report likewise stated that "mortgage service companies" are not covered "so long as the debts were not in default when taken for servicing." S. Rep. No. 95-382, at 3-4. This again reflects that "the activities of mortgage service companies *are* covered if they otherwise meet the statutory definition." *Ambridge*, 372 P.3d at 213.

These references to mortgages and mortgage service companies are telling. Foreclosures are a primary tool for enforcing mortgage obligations, and they are at least an obvious consideration in the context of addressing how debt collectors may operate in the fields of "mortgages" and "mortgage servicing." It would be especially odd for Congress to include these references without any hint that foreclosures are excluded. And at a minimum, these references show "Congress's awareness that unfair debt collection practices occurred in the same regulated arena." *Ambridge*, 372 P.3d at 214.

There is little need to resort to legislative history in light of the clear text, context, and purpose. But it is little surprise that Congress's background work reflects the same intent that appears on the face of the statute: the FDCPA broadly covers those seeking to collect debts (directly or indirectly), and its sweep readily includes those pursuing non-judicial foreclosure.

II. RESPONDENTS' REMAINING EFFORTS TO EVADE THE FDCPA'S BASIC SAFEGUARDS ARE MERITLESS

A. According to respondents, non-judicial foreclosure is the mere enforcement of a "security interest," not an

attempt to collect a debt. Br. in Opp. 12. Thus, respondents argue, "[i]f initiating a non-judicial foreclosure were sufficient to make an entity a debt collector, it would render meaningless the FDCPA's distinction between 'the enforcement of [a] security interest[]' and 'the collection of a[] debt[].'" *Ibid.*

This is baseless. The argument initially fails in its premise, because (as established above) non-judicial foreclosure most assuredly *does* constitute debt collection. The foreclosure process is not the same as retrieving a car parked on the street in the middle of the night; it is forcing the sale of a house *to liquidate a debt.* The sale generates proceeds, and those proceeds are designated for the creditor—in order to satisfy the debt. Colo. Rev. Stat. § 38-38-111(1). And that all assumes the prospect of foreclosure—clearly stated in pre-foreclosure notices—fails to induce payment in advance.

The FDCPA sets out the additional definition (for security enforcement) *as an addition.* It expands, not constricts, the main definition's coverage. See 15 U.S.C. 1692a(6) ("[f]or purpose of section 1692f(6) of this title, such term *also* includes"). It includes additional coverage for those who engage *only* in the enforcement of a security interest without also qualifying under the main definition, which itself already subjects the entity to the Act's full scope. The fact that respondents qualify as "debt collectors" under the main definition—irrespective of their efforts to enforce a security interest—eviscerates their position.

For similar reasons, respondents are wrong that petitioner's view renders "meaningless" the distinction between security enforcement and debt collection. The additional definition covers classic "repo" activity—efforts to "dispossess[] or disable[]" property *without* seeking payment or liquidation of a debt. See *Glazer*, 704 F.3d at

463-464; *Piper*, 396 F.3d at 236. This is confirmed by the scope of coverage under Section 1692f(6), the single provision this subcategory must follow. See 15 U.S.C. 1692f(6) (focusing on issues concerning "non-judicial action to effect dispossession or disablement of property"). While these substantive prohibitions make sense for things like towing cars and changing locks, they have an uncomfortable fit for foreclosures. *E.g.*, *Ho*, 858 F.3d at 583 (Korman, D.J., dissenting). And this is why courts have recognized that virtually "all of the cases" involving the additional definition and Section 1692f(6) involve "repo men," not non-judicial foreclosures. *Glazer*, 704 F.3d at 464.[13]

B. Respondents, mirroring the Ninth and Tenth Circuits, also argue that mortgage foreclosure is a traditional state interest, and the FDCPA fails to reflect a clear intent to displace state law in this area. Br. in Opp. 12; see also Pet. App. 10a-12a; *Ho*, 858 F.3d at 576. This argument fails on multiple levels.

First, respondents' argument is factually flawed. Even if foreclosure were a traditional state interest, Congress has heavily regulated in this area. It specifically regulates venue under Section 1692i(a)(1). All sides further agree that the FDCPA covers *judicial* foreclosures, which begs the question why Congress would hesitate to regulate *out-of-court* conduct while intruding into state *judicial* foreclosures. Aside from the FDCPA, Congress additionally regulates state foreclosures under laws like TILA, RESPA, and the Bankruptcy Code. See Br. in Opp. 22 (conceding the existence of such regulation).

---

[13] Moreover, when a person tows a car in the middle of the night, there is limited communication. The point is not to liquidate a debt, but to seize the car and return it to the creditor.

It would be passing strange for Congress to freely regulate all of these interests but draw the line at non-judicial foreclosures. Respondents have not yet articulated any basis to attribute such an odd policy preference to Congress's silence.

Second, in any event, this is *not* a situation of statutory silence. This is a case of *express* preemption. Congress specifically said that state laws are preempted that conflict with the FDCPA. 15 U.S.C. 1692n. It explained that the FDCPA serves as a backstop and provides minimum coverage. 15 U.S.C. 1692(e). It explained that state and local laws were inadequate. 15 U.S.C. 1692(b). And it created a mandatory exemption where States that provide equivalent coverage can be excused from the FDCPA. 15 U.S.C. 1692*o*.

That scheme reflects how Congress balanced the federalism concerns in this area, and it did so expressly. There is no exception for non-judicial foreclosure, and no reason to think the preemption provision does not mean what it plainly says.[14]

Third, respondents' "conflicts" are overstated. Complying with both state and federal law is not difficult once each regime is read sensibly (*Heintz*, 514 U.S. at 296-297), which is why no circuit rejecting respondents' theory has encountered problems. See *id.* at at 296-297 (it is "easier to read" the conduct-regulating provisions as providing some "additional, implicit exception" than to create a "far

---

[14] Moreover, the legislative history reflects that Congress specifically considered federalism concerns in providing national regulations for debt collectors. See, *e.g.*, S. Rep. No. 95-382, at 10 (recounting additional dissenting views). There are no "foreclosure" accommodations in the statutory text, and there is no license for the judiciary to craft an exemption that Congress did not. *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

broader exception" that appears nowhere in the Act's text). And, again, if the schemes do conflict, Congress instructed how to respond: federal law preempts state law, not vice versa. 15 U.S.C. 1692n. The FDCPA supplies a backstop against inadequate state procedures (15 U.S.C. 1692(b)); there is no license to displace the FDCPA because a state scheme providing *less* protection gets in the way.[15]

Finally, the FDCPA's construction is a question of *federal* law. It makes little sense to permanently construe a federal statute—which applies uniformly in all 50 States—to avoid a conflict with a handful of Colorado regulations that could change at any time. The FDCPA assumes a uniform meaning nationwide; it does not vary based on particular "conflicts" that might arise with any local scheme. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005). Respondents' contrary approach lets the tail wag the dog.[16]

---

[15] Indeed, Colorado itself has already adjusted to federal regulation, showing how the two schemes easily coexist. See, *e.g.*, Colo. Rev. Stat. §§ 38-38-103.1(1) (accommodating "federal law and CFPB rules and orders"), 38-38-109(2) (accommodating "the federal bankruptcy code").

[16] Congress passed baseline standards to protect consumers. If Colorado believes its own conflicting standards (if any) are more protective, it can always apply for an exemption from the agency tasked with enforcing the scheme. But it stands the law on its head to say the uniform *federal* standards give way once any single *State* adopts a different standard in the same area.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

SEPTEMBER 2018

APPENDIX

APPENDIX

1. 15 U.S.C. 1692 provides:

Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

2. 15 U.S.C. 1692a provides in pertinent part:

Definitions

As used in this subchapter—

* * * * *

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

* * * * *

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last

sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide

fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

* * * * *

3. 15 U.S.C. 1692f provides in pertinent part:

Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * * * *

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

* * * * *

4. 15 U.S.C. 1692i(a) provides in pertinent part:

Legal actions by debt collectors

(a) Venue

Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located * * * .

* * * * *

5. 15 U.S.C. 1692n provides:

Relation to State laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

6. 15 U.S.C. 1692*o* provides:

Exemption for State regulation

The Bureau shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that

under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.